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[redacted] AND NATURALIZATION SERVICE,
Petitioner,

v.

[redacted] DOHERTY,
Respondent.

[redacted]
[redacted] COURT OF APPEALS
[redacted] CIRCUIT

[redacted]
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INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a non-profit legal organization that seeks to promote observance of international human rights. Founded in 1978, the IHRLG provides legal assistance and information in the field of international human rights law and has consultive status with the Economic and Social Council of the United Nations. In lawsuits raising questions of international human rights, the IHRLG provides legal advice with the assistance of private attorneys working on a pro bono basis.

This brief addresses a single issue: whether the Attorney General has the authority to deny asylum to a refugee on the grounds that (1) United States foreign policy supports the prompt and lawful punishment of those who commit

acts of violence against a democratic state, and (2) the deportation of this particular alien to the United Kingdom is in the foreign policy interest of the United States.

STATEMENT OF THE CASE

Mr. Doherty's brief sets out the facts of this case and the proceedings below. Mr. Doherty has applied for asylum in the United States. The Board of Immigration Appeals ("BIA") found that he made a prima facie showing that he has a "well-founded fear of persecution" if he is returned to the United Kingdom (Cert. App. 99a-100a) -- which would, if proved, make him a "refugee" for purposes of asylum under section 203(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1158(a) (1988). He has been denied a hearing at which to establish his claim that he would be persecuted if deported to the United Kingdom.

The United Kingdom has requested Mr. Doherty's extradition based on the fact that he was convicted in 1981 of killing a British Army officer in a gun battle between the Provisional Irish Republican Army and British troops in Northern Ireland. In December, 1984, the United States District Court for the Southern District of New York, after an evidentiary proceeding, denied extradition on the ground that the offense was "political" under the extradition treaty then in force between the United States and the United Kingdom.[1/]

[1/] See In re Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984).

The Department of Justice has not sought extradition in another forum. Instead, the Attorney General has attempted to effect Mr. Doherty's deportation to the United Kingdom without going through extradition procedures. In 1988, Attorney General Meese personally overturned Mr. Doherty's designation of Ireland as the country to which he should be deported -- the first time an Attorney General had ever exercised such authority -- and ordered Mr. Doherty deported to the United Kingdom (Cert. App. 116a).

After Mr. Doherty renewed his application for asylum, and the BIA concluded he had made a prima facie showing of fear of persecution, Attorney General Thornburgh -- again, for the first time ever -- personally overruled the BIA and denied asylum, finding in pertinent part:

> First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." Deporting respondent to the United Kingdom would unquestionably advance this important policy. Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom.

(Cert. App. 82a) (citations omitted).

The net result is that Mr. Doherty is denied asylum based on asserted "foreign policy interests" of the United States, and is to be sent to the United Kingdom, on the order of the Attorney General, even though the federal courts have denied extradition and even though Mr. Doherty has shown sufficient evidence of persecution to convince the BIA that, at least, a hearing is warranted at which he can attempt to prove it.

SUMMARY OF ARGUMENT

In an unprecedented decision, the Attorney General has claimed the authority to grant or deny asylum to a refugee based on an assessment of American foreign policy interests. In effect, he has asserted the right to turn the humanitarian remedy of asylum into a political and foreign policy tool that can be used to favor our allies and chastise our enemies. He has, moreover, attempted to use his control over deportation procedures to circumvent the judicial procedures and safeguards imposed on extraditions.

The Attorney General's position is wrong for several reasons. First, the novel claim that the Attorney General can base asylum decisions on foreign policy factors violates United States treaties

and international law. The Attorney General's actions are subject to both the United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, and to basic principles of the law of nations relating to asylum. The Protocol prohibits precisely the sort of political discrimination that the Attorney General has engaged in, and his interpretation is contrary to the express intent of Congress and the President at the time the Protocol was ratified. Moreover, asylum is understood by all civilized states to be a humanitarian remedy that must be available equally to all, and cannot be based on a desire to placate or provoke another government. The Attorney General's attempt to turn it into a system for exhibiting approval or disapproval of

particular regimes is contrary to those basic principles of the law of nations.

Second, the Attorney General's reliance on an alleged "foreign policy" favoring the punishment of violent criminals to deny asylum and justify deportation is an attempt to circumvent the restrictions on extradition imposed by Congress and by treaty, and to improperly effect, by executive order, an extradition that has been refused under the applicable treaty. There is no such "policy" favoring return of alleged criminals outside of U.S. extradition treaties and, moreover, the Attorney General cannot, on his own orders, effectively dispense with the judicial safeguards imposed on extradition.

Third, the Attorney General's belated claim of this authority is a new

and extraordinary construction, contrary to the existing practices of the BIA (which has consistently made these discretionary decisions based on neutral and humanitarian factors), to prior statements of the Departments of Justice and State, and to positions that the United States has previously taken in litigation.

For these reasons (and those advanced in other briefs in support of respondent), the Second Circuit's decision should be affirmed.

ARGUMENT

I. THE ATTORNEY GENERAL DOES NOT HAVE DISCRETION TO RELY ON POLITICAL OR FOREIGN POLICY FACTORS IN DENYING ASYLUM TO A REFUGEE

Petitioner argues that the Attorney General's discretion to admit individual refugees is unfettered (Pet. Br.

20, 22-23). It relies chiefly on isolated statements in this Court's prior decisions, which merely recognize that the Attorney General, in fact, has been granted discretion to admit refugees. Where petitioner errs is in leaping from the concept of "discretion" to that of "unlimited discretion."

Petitioner's statutory argument for "unfettered" discretion is based primarily on (1) the fact that foreign policy considerations were made specifically relevant by Congress in other provisions of the Refugee Act of 1980 (Pet. Br. 20-21); and (2) the assertion that because Congress limited the Attorney General's authority to grant asylum, it necessarily must have intended no limitation on the authority to deny asylum (Pet. Br. 20).

The former argument is dealt with at length in the briefs of Mr. Doherty and other amici, and will not be repeated here. As for the latter, petitioner cites only Bowen v. Yuckert, 482 U.S. 137, 148 (1987), but that reliance is misplaced. The Bowen Court specifically rejected the argument that a limitation on discretion to grant a claim somehow implies "unlimited authority to deny meritorious claims." Id. at 148 n.6.

A. The Attorney General's Discretion Must Be Exercised In Accord With The 1967 Protocol

The United States' international obligations regarding refugees and asylum are governed by the United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (the "Protocol"). As this Court has previously noted, the

Protocol binds the United States "to comply with the substantive provisions of Articles 2 through 34" (i.e., all of the substantive provisions) of the United Nations Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 150, reprinted in 19 U.S.T. 6259 (the "Convention"). See INS v. Stevic, 467 U.S. 407, 416 (1984).

The Protocol is a treaty of the United States, and as such is part of the "supreme law of the land." U.S. Const. art. VI, cl. 2; Air France v. Saks, 470 U.S. 392, 406 (1985). The brief of amicus United States Congress demonstrates that the intent of Congress in promulgating the Refugee Act of 1980 was to adjust United States law to the requirements of the Protocol.

As an executive official, the Attorney General must conform his actions to the laws and treaties of the United States. Any discretion granted him by Congress with respect to asylum must therefore be exercised in accordance with the Protocol. As this Court has previously noted, both Congress and the President, at the time the Protocol was ratified, expected that the Attorney General would exercise his discretion to conform his execution of our asylum laws to the Protocol, not to depart from it.[2/]

[2/] At the time the Senate ratified the Protocol it was expected that where United States practices conflicted with the Protocol, "the Attorney General would honor the requirements of the Protocol." Stevic, 467 U.S. at 429 n.22; see also id. at 417-18 ("apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language").

B. Discrimination Among Refugees For Political Purposes Violates The Protocol and the Convention

It is a fundamental principle of international refugee agreements -- and the starting point for both the Convention and the Protocol -- that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, art. 14(1), adopted Dec. 10, 1948, U.N. Doc. A/811.[3/] Article 14 of the Universal Declaration is not self-executing, but neither is it mere pious sentiment. The Convention itself expressly recognized the force of the Universal Declaration in its preamble, and "affirmed the principle

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[3/] This right does not apply "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." Id.

that human beings shall enjoy fundamental rights and freedoms without discrimination." Convention, preamble, 19 U.S.T. at 6260. The international agreements at issue rely on the fundamental principles of fairness and equal treatment embodied in the Universal Declaration.[4/]

Thus, the preamble to the Protocol states that it is "desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention." Protocol, preamble, 19

[4/] As a State Department official testified, "The Protocol . . . is a determined effort by the United Nations to secure world-wide agreement that refugees everywhere must be given the protection and certain basic rights which are essential if they are to be given the chance to live as self-supporting and self-respecting human beings." S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 5 (1968) (written statement of Laurence Dawson).

U.S.T. at 6225. To carry this out, the Protocol adopts a definition of "refugee" that is taken, with slight modification, directly from the Convention:

> [T]he term "refugee" shall . . . mean any person [who] . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

Protocol, art. I.2, 19 U.S.T. at 6225. This definition had previously been taken, in large part, from the Statute of the United Nations High Commissioner for Refugees, ch. VI.A (ii), G.A. Res. 428(V)

(1950) (the "UNHCR Statute").[5/] The definition in the UNHCR Statute was made part of a mission that the United Nations emphasized was to be "of an entirely non-political character," and would be "humanitarian and social." UNHCR Statute, ch. I.2.[6/]

[5/] The UNHCR Statute defines a refugee as "[a]ny person who, as a result of the events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country . . . ." UNHCR Statute, ch. VI.A.(ii).

[6/] It is significant that under the Protocol, the "non-political" and "humanitarian" Office of the High Commissioner is specifically delegated the "duty of supervising the application of the provisions of the Protocol." See Protocol, art. II.1, 19 U.S.T. at 6226.

Article I of the Protocol expressly states that its provisions "shall be applied by the States Parties hereto without any geographic limitation." Protocol, art. I.3, 19 U.S.T. at 6225.[7] Moreover, article 3 of the Convention -- specifically incorporated through the Protocol -- requires the United States and other signatories to "apply the provisions of this Convention to refugees

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[7] Under the Convention, parties could create a kind of geographic limitation by choosing one of two alternate definitions of "refugee": (a) those whose refugee status was caused by "events occurring in Europe before 1 January 1951," or (b) those whose refugee status was caused by "events occurring in Europe or elsewhere before 1 January 1951." Convention, art. 1.B.(1), 19 U.S.T. at 6262 (emphasis added). The Protocol permits states which were parties to the Convention -- a group that does not include the United States -- to retain their article 1.B.(1)(a) designation. Protocol, art. I.3, 19 U.S.T. at 6225.

without discrimination as to race, religion or country of origin." Convention, art. 3, 19 U.S.T. at 6264 (emphasis added). The importance of article 3 of the Convention is underscored by the fact that it is one of but five articles in the Convention to which no reservation is permitted by the Protocol. See Protocol, art. VII.1, 19 U.S.T. at 6228.

Prior United States law had imposed "geographical and ideological" limitations on asylum;[8] the Protocol's enactment, as Congress knew at the time of ratification, required elimination of what this Court has called these "unacceptable geographic and political distinctions." INS v. Cardoza Fonseca, 480

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[8] See H.R. Rep. No. 608, 96th Cong. 1st Sess. 1-5 (1979) (discussing history of these limitations).

U.S. 421, 435 (1987). As the Secretary of State informed the President when he forwarded a copy of the Protocol, "[T]he general approach of the Protocol is to provide that refugees in each acceding country . . . are to be treated without discrimination either as compared with other refugees, with other aliens or with nations." Letter of Submittal from Secretary of State Rusk to President Johnson, July 25, 1968, reprinted in 114 Cong. Rec. 27758 (1968).

To take "foreign policy" considerations into account in making asylum decisions is to, in effect, treat refugees differently based on the country from which they are fleeing or which is demanding their return. To treat aliens disparately based on such factors is to engage in discrimination prohibited under

article 3 of the Convention. To treat similarly situated aliens differently based on such grounds is to create precisely the kind of "geographic limitation" prohibited under article I.3 of the Protocol. Such conduct, moreover, deprives the alien of the "equal status" that the Protocol was designed to ensure.

Thus, the Attorney General's decision to let this country's relations with the United Kingdom determine the disposition of Mr. Doherty's asylum application is contrary to the letter and the spirit of the 1967 Protocol, and violates treaty obligations of the United States.

C. Reliance On Foreign Policy Interests In Making Asylum Decisions Is Contrary To Presidential And Congressional Intent Behind The Accession To The Protocol

The Attorney General's construction of the Protocol is also directly contrary to the foreign policy considerations that led to U.S. accession to the Protocol. Both the President and the Senate, in acceding to the Protocol, specifically intended to create a humanitarian remedy and to further the world standing of the United States as a humanitarian nation.

The Secretary of State, in sending the Protocol to the President, explained: "Accession to the Protocol would promote our foreign policy interests through reaffirming, in readily understandable terms, our traditional

humanitarian concerns and leadership in this field. It would also convey to the world our sympathy and firm support in behalf of those fleeing persecution." Letter of Submittal from Secretary of State Rusk to President Johnson, July 25, 1968, reprinted in 114 Cong. Rec. 27759 (1968).

The President, transmitting the Protocol to the Senate, stated, "United States accession to the Protocol would thus constitute a significant and symbolic element in our ceaseless effort to promote everywhere the freedom and dignity of the individual and of nations; and to secure and preserve peace in the world." Letter of Transmittal from President Johnson to United States Senate, Aug. 1, 1968, reprinted in 114 Cong. Rec.

27758 (1968). The President also declared:

> It is decidedly in the interest of the United States to promote this United Nations effort to broaden the extension of asylum and status for those fleeing persecution. Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.

Id. at 27757 (emphasis added).

In explaining the Protocol to the Senate, the Acting Deputy Director of the State Department's Office of Refugee and Migration Affairs stated, "The Department of State is convinced that United States accession to the Protocol . . . would enhance our foreign policy interests and our world image of humanity and concern for the individual." S. Exec. Rep. No.

14, 90th Cong., 2d Sess. 7 (1968) (hereinafter "1968 Senate Report") (statement of Laurence Dawson). He added:

> We think that the foreign policy interests that would be inherent in our accession form the basis for our strong recommendation that the United States accede. Those foreign policy interests are [first,] that they extend the image of the United States as a nation concerned with the persecuted and with the individual at a time when this is ever more important.
>
> Secondly, that it will enhance our diplomatic competence and our diplomatic effort to try to produce more and better acceptance of humane and civilized standards in other countries for refugees.

Id. at 10 (remarks of Acting Deputy Director Dawson).

In other words, it was the specifically humanitarian remedy that was deemed to be in the foreign policy interests of the United States. The ability to position the United States as a humanitarian nation was itself important to

"enhance our diplomatic competence and our diplomatic effort." Id.

The Attorney General's claim that he can bend the asylum procedures to reach other foreign policy objectives would vitiate the very benefit sought to be gained through accession to the Protocol: to announce to the world that United States asylum policy is humanitarian and fair. The Attorney General's construction simply cannot be squared with the intent behind U.S. accession to the Protocol.

D. Basing Asylum Decisions On Political Considerations Is Contrary To The Law of Nations

The Attorney General's construction is also contrary to the position that asylum holds in the law of nations. It has long been settled that general international law "is part of our law,"

and also is readily suited to judicial determination. Hilton v. Guyot, 159 U.S. 113, 163 (1895). It is, moreover, well-established that the Court should look to "the customs and usages of civilized nations" when evaluating the lawfulness of Executive action. See The Paquete Habana, 175 U.S. 677, 700 (1900).

It is a fundamental principle of international law that all states have the right to grant asylum. It is a concomitant principle that because asylum is a humanitarian remedy, not a political action, no state has the right to object to the grant of asylum by another.

The United Nations General Assembly declared, shortly before the United States' accession to the Protocol, that "the grant of asylum by a State to persons entitled to invoke article 14 of

the Universal Declaration of Human Rights is a peaceful and humanitarian act, and that, as such, it cannot be regarded as unfriendly by any other State." United Nations Declaration on Territorial Asylum, G.A. Res. 2312(XXII), preamble (1967) (emphasis added). A leading commentator explains:

> The granting of asylum is not in itself an unfriendly act, and this must necessarily also apply to the acceptance by the State granting asylum of the asylum-seeker's statement that he has suffered or is fearing persecution in his country of origin. It follows that a finding by the authorities of one State to the effect that persecution is taking place in the territory of another State, cannot be construed as a censure of the government of the latter State, and that such a finding does not constitute any interference or intervention in the domestic affairs of that State.

A. Grahl-Madsen, Territorial Asylum 12-13 (1980).

A major purpose of the Convention and the Protocol is, in fact, to minimize international tension over refugees. The signatories to the Convention expressed "the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between states." Convention, preamble, 19 U.S.T. at 6260 (emphasis added).

As Congress was informed at the time of U.S. accession, "[T]here could be no doubt that resolving refugee problems in these terms, in such humanitarian terms, will conduce not only to the well-being of the refugee but also to the reduction of international tensions, the stability of the countries into which the refugees flee, and ultimately and some-

times immediately the preservation of peace." 1968 Senate Report at 4 (remarks of Acting Deputy Director Dawson) (emphasis added).

The Attorney General turns this principle on its head. He claims the authority to subordinate the humanitarian remedy of asylum to a view of current foreign policy considerations. As a result, any future grant or denial of asylum could reasonably be read by the foreign government in question as a reflection of its standing in U.S. foreign policy.

An incident roughly contemporaneous with the Attorney General's 1989 decision illustrates the fallacy of his position. The Government of China was angered when the United States granted refuge in its Beijing embassy to two

prominent dissidents (who were sought for prosecution under valid Chinese criminal warrants), and also granted asylum to Chinese students in the United States in the wake of the Tianamen Square massacre in June, 1989.[9/] The United States granted asylum to the Chinese on humanitarian grounds, and under the law of nations the Chinese government had no legitimate grievance. "The fact that the country of origin of a refugee considers his very presence in the country of

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9/ The disputes over asylum to dissident leaders Fang Lizhi and Li Shuxian, and to Chinese students in the United States, are discussed generally in Scheffer, U.S. Embassy Makes a Risky Refuge, Wall. St. J., June 13, 1989, at A20, col. 3; Williams, Turmoil in China; Crackdown on Dissent; China Imposes New Curbs on Travel Abroad, L.A. Times, June 19, 1989, part 1, p. 1, col. 5; Sun, Stance of Chinese Government Disappoints Bush Administration, Wash. Post, Mar. 7, 1990, at A30.

asylum to be a great nuisance (or worse), cannot alter the picture and justify a demand for discontinuing asylum." A. Grahl-Madsen, supra, at 19.

The United Kingdom may consider Mr. Doherty's presence in the United States to be a nuisance, and that may cause some tension with an old ally. But under international law, the British (like the Chinese) have no right to take umbrage at a grant of asylum made on purely humanitarian grounds. If, however, the Attorney General can deny asylum to an allegedly British citizen[10/] because we have good relations with the United Kingdom, but grant it to a Chinese citizen because we disapprove of that government's actions, then the offended

[10/] Mr. Doherty has denied that he is a citizen of the United Kingdom.

government would be absolutely correct in claiming that the grant of asylum is an unfriendly act.

A construction of the Attorney General's discretion that would countenance a breach of the law of nations, and leave the United States open to justified condemnation or reprisals, should not be adopted unless it is clear that Congress intended that result. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (an act of Congress should never be construed to violate the law of nations if another reasonable construction is available); Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (same). Given the history of the United States' accession to the Protocol, outlined above, it is inconceivable that

Congress intended to give the Attorney General such discretion.

II. THE ATTORNEY GENERAL'S USE OF DEPORTATION TO ACCOMPLISH AN EXTRADITION IS IMPERMISSIBLE

All of the proceedings in this case, and both decisions of the Attorneys General, have been designed to accomplish the effective extradition of Mr. Doherty to the United Kingdom. Attorney General Thornburgh's decision is specifically based, in part, on this law-enforcement rationale: that United States foreign policy supports the prompt and lawful punishment of those who "commit acts of violence against a democratic state" (Cert. App. 82a). The Department of Justice has been very candid about this. On national television, one of the INS attorneys responsible for the case explained:

> It's quite clear that in the extradition proceeding the objective was to get Doherty to the United Kingdom. And in the deportation proceeding our objective is to get him to the United Kingdom. This is just an alternate means to accomplish that.

(App. 77.)

The fatal flaw in this position is that there is no American "foreign policy" that specifically favors return of criminals for punishment other than that expressed in the extradition treaties of this nation. Cf. Factor v. Laubenheimer, 290 U.S. 276 (1933) (a "policy" not embodied in the terms of an extradition treaty could not affect its scope). A Federal district judge has already determined that our treaty with the United Kingdom did not permit extra-

dition for the crimes charged.[11/] In re Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

The Attorney General's extraordinary argument is that American foreign policy demands the return of an alleged criminal to the United Kingdom when the extradition treaty between the two nations does not authorize it. He claims authority to circumvent the restrictions specifically included by the President and the Senate in the extradition treaty then in force with the United Kingdom.

11/ The Attorney General's failure to pursue extradition in another forum -- his obvious remedy for the initial denial -- may raise an inference that the Attorney General is not sure that the policy outlined in the extradition treaty really favors sending Mr. Doherty to the United Kingdom.

This Court has previously resisted attempts to evade the restrictions of the extradition statutes, even for ostensibly good causes like the punishment of criminals. As the Court noted in Johnson v. Browne, 205 U.S. 309 (1907), "the escape of criminals is, of course, to be very greatly deprecated," but "it is still most important that a treaty of this nature [extradition] between sovereignties should be construed in accordance with the highest good faith," and not be stretched by "doubtful construction of some of its provisions." Id. at 321.

Even more forcefully, this Court has rejected the idea that the Executive has the authority to achieve the extradition of alleged criminals on its own authority. It was nearly 200 years ago

that John Adams's administration engineered the delivery of a seaman in American custody, Jonathan Robbins, to authorities of the United Kingdom, who promptly hanged him for murder.[12/] The Robbins affair has some parallels with this one. Robbins (who was probably an Irishman and a British subject) claimed to have been unlawfully impressed into service on a British warship. He allegedly helped lead a mutiny against a concededly brutal captain, and killed a British officer in the process. Robbins was viewed by some in America as a hero who resisted British tyranny, but was

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12/ The details of the Robbins affair are set out in Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990).

seen by others as a pirate, a traitor, and a murderer.[13/]

The Adams administration was widely viewed as having manipulated the extradition process to achieve delivery of Robbins to Great Britain. As this Court noted a half-century later, the public outcry over the Adams administration's "assumption of power to arrest, imprison, and extrude [a fugitive] on executive warrants" led directly to the administration's downfall. In re Kaine, 55 U.S. (14 How.) 103, 112-13 (1852) (plurality opinion). More important, since "a great majority of the people of this country were opposed to the doctrine that the president could arrest, imprison, and surrender a fugitive, and

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13/ See generally Wedgwood, supra, note 12.

thereby execute the Treaty [with Great Britain] himself," Congress enacted the forerunner of the present extradition statute under which, "from that day to this, the judicial power has acted in cases of extradition . . . independent of executive control." Id. at 112. See 18 U.S.C. § 3184 (1988) (committing authority over extradition proceedings to judges and justices of federal and state courts and magistrates authorized by them).

Since the 18th Century, no administration has argued that it can, on executive writ, extradite an alleged felon to a foreign country. But the Attorney General here is claiming the equivalent authority to manipulate the deportation laws to effectively return an alleged malefactor to a foreign govern-

ment for the express purpose of imposing punishment -- without the safeguards and judicial review imposed by Congress through extradition treaties and procedures.

This Court has long recognized that "an extradition without an unbiased hearing before an independent judiciary" is "highly dangerous to liberty, and ought never to be allowed in this country." Kaine, 55 U.S. at 113. The Attorney General's extraordinary attempt to arrogate to himself the power to make such decisions must be rejected.

III. THE ATTORNEY GENERAL'S CONSTRUCTION IS CONTRARY TO THE PRIOR POSITIONS OF THE JUSTICE DEPARTMENT AND OTHER EXECUTIVE AGENCIES

The Attorney General's claim that he can deny asylum based on political or foreign policy considerations is also

contrary to the prior practice of the INS, to repeated prior statements made by the Executive Branch, and to the positions repeatedly taken by the Executive in litigation. These earlier actions demonstrate both the unprecedented nature of the Attorney General's construction and its complete lack of basis in statute, treaty, or history.

Since enactment of the Refugee Act of 1980, the BIA has repeatedly faced discretionary asylum determinations. It has not automatically granted asylum to all who are eligible, yet it has certainly not engaged in political judgments as to which foreign governments we most want to offend or appease. On the contrary, it has applied a consistent series of neutral and humanitarian criteria to the issue of who should be

granted asylum in this country. Among the factors it considers are: (1) whether the alien passed through other countries on the way to the United States; (2) whether orderly refugee procedures were available in those other countries; (3) the alien's living conditions, safety, and potential for long-term residence in another country; (4) whether the alien has relatives legally in the United States or other personal ties to this country; (5) whether the alien engaged in fraud to circumvent orderly immigration procedures; (6) general humanitarian concerns, such as the tender age or poor health of the alien; and (7) whether the alien meets the asylum standard (well-founded fear of persecution) but cannot meet the higher standard for withholding of deportation.

See In re Pula, Interim Dec. No. 3033 (BIA, Sept. 22, 1987). The Board has created a presumption that "[i]n the absence of any adverse factors . . . asylum should be granted in the exercise of discretion." Id.

It is true that no individual refugee has a right to asylum in the United States, and not all who apply can be given asylum here. The BIA's criteria seek to determine which individuals are, on their own merits and in the application of neutral and humanitarian criteria, most deserving. The Board has never suggested that its decisions ought to be influenced by whether the United States is for or against a particular regime. Petitioner does not explain how the criteria developed by the Board and

heretofore applied are erroneous or insufficient.[14/]

Many have charged over the years that the Government has improperly based asylum decisions on politics, not on humanitarian concerns. See generally Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess., (1989) (hereinafter, "1989 Hearings"); Helton, Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise, 17 U. Mich. J.L. Ref. 243 (1984). Many lawsuits alleging bias have been brought; on at least one occasion, the INS has

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14/ One unexplained aspect of the Attorney General's decision is whether these "foreign relations" judgments are now to be made by the BIA judges, or are reserved to him personally.

been adjudged to be discriminating against individuals from particular nations. See Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1502 (C.D. Cal. 1988), aff'd, 919 F.2d 549 (9th Cir. 1990).

Yet the Attorney General has apparently never defended these actions on the ground that he is entitled to take political or foreign policy considerations into account. On the contrary, both the Department of Justice and the Department of State have frequently asserted that they do not discriminate based on such factors. In 1989, INS Commissioner Nelson denied that the Attorney General had created a policy favoring Nicaraguan refugees, testifying that "our basic policy that we have been trying to follow and certainly following [sic] at this point is trying to treat

everybody the same." 1989 Hearings at 69. At the same hearings, Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs Paula Dobriansky asserted:

> We apply these standards fairly to applicants from all countries. On occasion, our immigration policy has been criticized, with claims that foreign policy considerations have governed the granting of asylum. In fact, we do not have a nation-specific approach, but rather, apply the same standards to aliens from all countries including those from El Salvador and Nicaragua.

1989 Hearings at 55.

Before this Court, in Jean v. Nelson, 472 U.S. 846 (1985), the INS defended against charges it improperly discriminated against Haitians in the context of parole, not by arguing that it had discretion to discriminate, but by arguing that it did not discriminate. And in American Baptist Churches v.

Thornburgh, No. C-85-3255RFP (N.D. Cal. 1991) (discussed in briefs of other amici) the Justice Department conceded that political factors should not be taken into account in determining refugee status.

Yet the Attorney General is arguing here that, yes, he can make discriminatory decisions if he chooses to. This position is at odds with virtually every other public pronouncement on the subject by the political branches. Not only is it, therefore, not entitled to any substantial deference, see Cardoza Fonseca, 480 U.S. at 446 n. 30 (new interpretation which conflicts with earlier construction is entitled to "[c]onsiderably less deference"), it is plainly wrong.

CONCLUSION

For the reasons set forth above and in the other briefs in support of Mr. Doherty, the Second Circuit's reversal of the Attorney General's determination of June 30, 1989, should be affirmed.

Respectfully submitted,

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